

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

MINUTE ORDER

Case No.: 3:20-cv-00851-MO

Date of Proceeding: June 23, 2022

Case Title: Smith v. Ethicon et al.

Presiding Judge: Hon. Michael W Mosman

Courtroom Deputy: Jody Harper
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Reporter: Bonita Shumway

DOCKET ENTRY: Minutes of Proceedings: Pretrial Conference held.

Hearing held before Judge Michael W. Mosman on Plaintiff's Omnibus Motion in Limine [260] and Defendants' Omnibus Motion in Limine [268].

The Court granted Plaintiff's Omnibus Motion in part and denied it in part, making the following rulings for reasons stated on the record:

1. The motion to exclude FDA evidence is GRANTED in part and DENIED in part;
2. The motion to exclude FDA advisory committee recommendations is GRANTED;
3. The motion to exclude the Time to Rethink article is DENIED as moot;
4. The motion to exclude the AUGS/SUFU position statement is DENIED as moot;
5. The motion to exclude statements regarding randomized controlled trials is DENIED;
6. The motion to exclude assumptions about knowledge of undisclosed risks is DENIED;
7. The motion to exclude evidence of what pelvic surgeons know is DENIED;
8. The motion to exclude statements about professional education is DENIED;
9. The motion to exclude statements about the rarity of complications is DENIED;
10. The motion to preclude the defending of Prolift based on SUI devices is GRANTED in part and DENIED in part;
11. The motion to exclude history of polypropylene use in body is GRANTED in part and DENIED in part;
12. The motion to exclude statements about pelvic mesh litigation is DENIED as moot;
13. The motion to exclude collateral source payments is DENIED as moot;
14. The motion to exclude number of women allegedly treated with mesh is GRANTED in part and DENIED in part;
15. The motion to exclude witnesses' personal experience and preferences is GRANTED in part and DENIED in part;
16. The motion to exclude evidence of prolapse meshes remaining on the market is DENIED as moot;
17. The motion to exclude evidence of "good acts" or "reputation" evidence is GRANTED in part and DENIED in part;
18. The motion to exclude references to amounts paid to experts in other cases is DENIED;
19. The motion to exclude evidence of surgeon's monograph is DENIED;

20. The motion to exclude evidence criticizing medical care provided by Plaintiff's treating physicians is DENIED as moot;
21. The motion to exclude evidence of Plaintiff's smoking is DENIED;
22. The motion to exclude evidence of vaginal atrophy and estrogen use is DENIED;
23. The motion to limit treating physicians' testimony is DENIED; and
24. The motion to exclude unrelated medical conditions and irrelevant matters is:
 - a. DENIED as to Plaintiff's hysterectomy;
 - b. GRANTED in part and DENIED in part as to Plaintiff's use of narcotics; and
 - c. DENIED as to Plaintiff's psychiatric treatment.

The Court granted Defendants' Omnibus Motion in part and denied it in part, making the following rulings for reasons stated on the record:

1. The motion to exclude company documents and emails is:
 - a. GRANTED in part and DENIED in part as to the wire brush email;
 - b. DENIED as to the blue particles email;
 - c. GRANTED as to the "I would not like for my wife to undergo this procedure" email;
 - d. DENIED as moot as to the pessary email string
 - e. GRANTED as to the email from Dr. Leong;
 - f. DENIED as to the "elusive" email;
 - g. to be supplemented by Plaintiff as to the In-Depth Interviews;
 - h. to be supplemented by Plaintiff as to the PA Consulting Group Report; and
 - i. GRANTED in part and TAKEN UNDER ADVISEMENT in part as to the TVT-O emails.
The Court shall consider whether the emails are permissible for punitive damages purposes.
2. The motion to exclude evidence concerning other pelvic mesh litigation is GRANTED;
3. The motion to exclude mesh-related complications that Plaintiff did not experience is DENIED;
4. The motion to exclude Medical Device Reports is DENIED as moot;
5. The motion to exclude Material Safety Data Sheets is DENIED as moot;
6. The motion to exclude evidence of Ethicon's decision to stop selling Prolift is GRANTED;
7. The motion to exclude evidence of the pre-clearance marketing of Prolift is DENIED as moot;
8. The motion to exclude evidence of FDA regulatory actions is DENIED as moot as to the third-party submissions to the 2011 FDA Advisory Committee and otherwise GRANTED;
9. The motion to exclude evidence of foreign regulatory actions is DENIED;
10. The motion to exclude evidence of post-implant revisions to Prolift warnings is TAKEN UNDER ADVISEMENT;
11. The motion to exclude surgical videos and photographs is DENIED as moot;
12. The motion to limit the use of mesh exemplar devices is GRANTED in part and DENIED in part;
13. The motion to preclude use of video deposition excerpts during opening statements is DENIED as moot;
14. The motion to preclude reference to Defendants' net worth during opening statements is DENIED as moot;
15. The motion to exclude evidence of spoliation is GRANTED.

The Court made the following rulings as to jury instructions:

1. As a patient, Plaintiff constitutes an "ordinary consumer" of Prolift;
2. The parties shall provide supplemental briefing as to whether Plaintiff needs to show that there was a feasible alternative design for Prolift;
3. The substantial factor test applies to Plaintiff's claims;

4. The learned intermediary defense applies only to Plaintiff's negligent failure to warn claim, not her strict scrutiny claim;
5. Whether a state-of-the-art defense is appropriate is TAKEN UNDER ADVISEMENT.

Defendants shall provide supplemental briefing on its feasible alternative design jury instruction by 6/27/2022. Plaintiff shall respond to Defendants' supplemental briefing by 6/30/2022.

Plaintiff's supplemental briefing on the In-Depth Interview and PA Consulting Group reports is due 6/30/2022. Defendants' response is due 7/5/2022. The parties should also propose a briefing and hearing schedule for their *Daubert* motions by 7/5/2022.

The parties shall submit witness lists, exhibit lists, deposition designations, objections to witness lists, exhibit lists, and deposition designations by 7/15/2022.

The parties shall submit updated jury instructions and verdict forms by 8/30/2022. Objections to jury instructions and verdict forms are due 9/13/2022. The parties will resolve jury instruction conflicts in the hearing scheduled for 9/27/2022